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No. 89-910

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALICE CHATHAS and BYRON ELLIS,

Petitioners,

v.

NORBERT SMITH, Individually and as Chief of Police of Village of Evergreen Park, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS JAMES ROSS, VINCENT RUFFALO, CARMEN DiCARLO AND ANGIE CHMIELEWSKI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the directed verdict was properly affirmed, consistent with applicable precedent, where the Deputies' conduct was objectively reasonable in effectuating the judicial order for security, and no reasonable jury could have found for plaintiffs.

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STATEMENT OF THE CASE

Petitioners are Byron Ellis and Alice Chathas, Mr. and Mrs. Ellis at the time of trial. The Respondent Cook County Sheriff's Deputies[1] are James Ross, Vincent Ruf-

[1] Among defendants in this case, plaintiffs initially named as defendants ten Cook County Sheriff's deputies who had been present in the Worth Township Courthouse on March 30, 1981. (R. 1, Complaint)

falo, Carmen DiCarlo and Angie Chmielewski. Deputies DiCarlo and Chmielewski were granted summary judgment against Ellis prior to the trial (a fact which both the district court and court of appeals overlooked (R. 155, Mem. Op.). The other Respondent Deputies, as well as the other defendants in the case, were all granted directed verdicts, which were affirmed by the Court of Appeals decision.

Security was set up at the Worth Township Courthouse on March 30, 1981, pursuant to the order of Presiding Judge Irving Eiserman, based upon a psychiatrist's report that Byron Ellis was potentially dangerous. (A. 6) That morning, Deputy James Ross spoke with Assistant Supervisor Vincent Ruffalo, and explained the reason for the security, a potential problem with Byron Ellis, who was a "walking time bomb." The concern was a potential for violence. Therefore, everyone was to be searched, and no weapons would be permitted. (Tr. 257-258, 261, 309, 314, 645-646, 667-668) Mr. Ross disclosed the reason for the extra security to Mr. Ruffalo only, because he did not want any attention focused on Byron Ellis. (Tr. 315, 669)

Ross, who was familiar with the building, told Ruffalo to see that all doors except one were locked, and to set up a security checkpoint. (Tr. 257-258, 314-315) Ruffalo did so, and posted deputies at various assignments. (Tr. 670) Any guns, including those of police officers, were checked in and locked in a file cabinet. (Tr. 263-264, 318)

Neither Ross nor Ruffalo participated in any discussion regarding taking Ellis to Tinley Park. (Tr. 209-210) Mr. Ross asked the Evergreen Park officers to stand out of the way, so that Byron Ellis could not see them when he came in, because after reading the letter Judge Eiserman had shown him, Ross was concerned that seeing them might upset Ellis. (Tr. 286)

Deputy Carmen DiCarlo was assigned to operate the hand held metal scanning device at the checkpoint. A sign at the desk advised that persons entering would have to be searched. (Tr. 334-335) A pretrial stipulation specifies that Deputy DiCarlo stayed at the checkpoint at all times while plaintiffs were in the building. (R. 138, Pretrial Order, stip. 16; Tr. 612-614)

Deputy Angie Chmielewski was assigned to search women's purses. (Tr. 681) Such carried items must be checked visually, because common items such as keys frequently set off a scanning device. (Tr. 343) Mrs. Chmielewski was to check purses of all women who entered the building, and when circumstances permitted, she did so in the privacy of a jury room. (Tr. 289-290, 343-344, 680-681) Neither Deputy DiCarlo nor Deputy Chmielewski was informed of anything particular regarding Byron Ellis or Alice Chathas. (Tr. 681)

The purpose of the deputies that day was to provide for the security of the courthouse and of all persons present. (Tr. 682) They were to make sure that no firearms were available in the building (Tr. 677-678; A. 6), and to preserve peace and order. (Tr. 306-307, 698)

Plaintiffs Chathas and Ellis arrived at the courthouse at about 11:40 a.m., and approached the security checkpoint. (Tr. 460-461) DiCarlo was not wearing a gun. (Tr. 609) He scanned Chathas with the metal detecting device and she was allowed to pass into the rotunda area (Tr. 157-158, 161), where she walked and was met by Angie Chmielewski. They walked together, not touching, into the jury room, where Angie was to search Chathas' purse. (Tr. 161, 210-211, 289-290, 294, 317, 679-680)

Chathas herself testified that after she had been scanned, she took a step. Then, according to Chathas, Deputy DiCarlo

and an unidentified deputy took her by her arms, lifting her body, and moved her against her will to the jury room, where Angie Chmielewski was waiting. (Tr. 463) Chathas testified that the door to the jury room was closed after her and that the lights were out. (Tr. 463-464) Other witnesses said that the door was partially closed, and partially open, and that the fluorescent lights were on, but were not very bright. (Tr. 295, 330, 680)

Chathas testified that Mrs. Chmielewski searched her purse and did a pat-down. (A. 7) According to Chathas, Angie did not respond to inquiries as to why the search was required. She smiled at Chathas and laughed a little. (Tr. 464-465) Angie was not carrying a gun, and Chathas did not remember ever seeing her with a gun. (Tr. 615) Chathas, who testified that she was sure that she was singled out for a search (Tr. 610), admitted that she did not know what went on outside her presence. (Tr. 609)

Chathas testified that she knew Angie Chmielewski and Carmen DiCarlo previously, and that she had had no problems or quarrels with either of them. (Tr. 605-606, 625-627) In her testimony, she referred to them as "Angie" (Tr. 464-465, 626), and "Carmy." (Tr. 626) On April 1, 1981, 2 days after being at the Worth Township Courthouse, Chathas gave a signed statement, at her own office, to David Copeland, the Director of the Sheriff's Internal Investigations Division. (Tr. 622-624) That statement mentioned Ross and Ruffalo by name, indicating that they walked into a room. The statement does not refer to Carmen DiCarlo or to Angie Chmielewski. Chathas knew both by name and knew that they worked for the Sheriff. (Tr. 625-627)

While Chathas went to the jury room, DiCarlo scanned Ellis, opening and checking his briefcase. Then Ellis was

permitted to pass the checkpoint, and he proceeded into the rotunda area, toward the courtroom. (Tr. 158, 648, 814, 855, 894, 915-916)

Consistent with plaintiffs' pretrial stipulation (R. 138, Pretrial Order, par. 16; Tr. 612-614), Ellis testified that Deputy DiCarlo, after scanning Chathas, remained at the security checkpoint and scanned Ellis next. (Tr. 892-893, 914-916) Ellis characterized DiCarlo's conduct as "a gentleman at all times." (Tr. 916) Ellis testified that he had seen Chathas taken away by unidentified deputies and made no effort to stop them then, or to follow her once he was past the checkpoint himself. (Tr. 584-585, 892-894)

Chief Smith, Lt. Evoy and Lt. Bergman approached Ellis and requested that he go to Tinley Park for a psychiatric evaluation. (Tr. 159, 295-297, 302, 648, 815) Ellis refused and called out for Chathas, who came out of the jury room. (Tr. 161-162, 302, 467) Chathas testified that she saw no deputy touch Ellis. (Tr. 615)

Ellis himself testified that he was struggling with Smith, Evoy, Bergman and others, trying to get into the courtroom, and that Ross tackled him by the waist and pulled him away from the courtroom. (Tr. 816; A. 7) Ellis knew that the job of deputy sheriffs is to keep order in the courtroom, and admitted that Ross did not want Ellis, kicking and struggling, in the courtroom. (Tr. 917-920) In his signed statement to David Copeland on April 1, 1981, Ellis did not mention being tackled or otherwise touched by Ross. (Tr. 922-926) Jim Ross testified that he did not touch Ellis, and never saw any other deputy touch Ellis. (Tr. 330)

Ellis was speaking loudly. (Tr. 320) The group was near the jury room. Chathas went back in, and the others followed. (Tr. 302, 318, 467) After they had been in the room

a short while, and the argument was rather heated, Ruffalo suggested that the three plainclothes Evergreen Park officers leave, so Ellis could talk to his counsel alone. (Tr. 675) Ruffalo himself stayed in the room with Ellis to prevent any violence. (Tr. 676)

Chathas walked in and out of the room several times. (Tr. 330, 542, 617) She testified that once Ross and Evoy were in her way and did not move when she asked them to, but that she in fact did exit and no one grabbed or stopped her. (Tr. 472; A. 8) None of the defendants ever told her she had to stay in the room. (Tr. 618, 621)

Vincent Ruffalo testified that Ellis spoke of problems with the city, and threatened that before he would go to Tinley Park there would be a "blood bath". (Tr. 671-672, 677-678) Ellis said that the room was "full of weapons," meanwhile moving several ashtrays and placing two or three chairs in front of himself. (Tr. 687-688) Ruffalo testified: "[i]t was unmistakable, in my opinion, what he meant by the movement of those chairs" (Tr. 688), and "[m]y understanding of his movements and his actions was that he might become violent and use those objects in a violent fashion, unmistakable." (Tr. 691) Ruffalo did not have a gun with him in the room, having passed it to another deputy outside before he entered, and was at that time afraid of Ellis. (Tr. 694)

Terry Milan, an Alsip paramedic, testified that deputies took care of clearing bystanders away from the door to the jury room. (Tr. 703) Ross ordered the paramedics, before they entered the jury room, to remove from their belts their scissors and other implements, which could be used as weapons. (Tr. 325) When Milan entered the jury room to attend to Ellis, he saw no guns inside the room. (Tr. 710, 714) Initially, Chathas threatened that the para-

medics would be co-defendants in a lawsuit if they touched Ellis, but later gave permission for them to do their job. (Tr. 707-708)

After speaking to Alsip Police Sergeant Murray, a friend, Ellis agreed to go to Tinley Park peaceably. (Tr. 857-859) Ellis asked Ross to make sure the Evergreen Park officers were not present in the lobby, or Ellis would "blow up." (Tr. 326) Ross therefore made sure that the officers stayed in the courtroom. (Tr. 327)

Ellis and Chathas walked out of the jury room and out of the building. (Tr. 327, 484, 858-859; A. 9) They rode in an ambulance to Tinley Park. (Tr. 621) No deputy was present in the ambulance or at Tinley Park. (Tr. 621) At the time Chathas and Ellis left, people were still being scanned, and Jim Ross saw Angie checking a woman. (Tr. 328)

Neither Chief Smith nor James Ross ever saw Angie Chmielewski or any other deputy touch Chathas that day. (Tr. 211, 317) Ross neither touched Ellis nor saw any other deputy touch him that day. (Tr. 33)

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS' DECISION WAS CONSISTENT WITH OTHER COURT OF APPEALS' DECISIONS AND WITH THOSE OF THIS COURT, WHERE THE DEPUTIES CONDUCTED THEMSELVES REASONABLY TO EFFECTUATE THE JUDICIAL ORDER FOR SECURITY, AND WHERE NO REASONABLE JURY COULD HAVE FOUND FOR PLAINTIFFS.

Petitioners claim that their rights were violated, but make no effort to demonstrate any basis for granting certiorari. The Petition glosses over the attendant circum-

stances, which are therefore related in some detail in Respondents' Statement of the Case, *supra*. In fact, the court of appeals' opinion is consistent with the decisions of other courts of appeals and of this Court, and Petitioners have not demonstrated otherwise. Petitioners' claims against the deputies dissolve when analyzed in the context of the circumstances that day in the courthouse, as presented by the evidence in Petitioners' own case-in-chief.

First, it must be noted that the deputies provided security at the courthouse, but had nothing to do with taking Byron Ellis for a psychiatric evaluation. The Court of Appeals recognized this distinction (A. 14), although the Petitioners throughout this litigation have attempted to lump together all of the myriad defendants. Second, the Court of Appeals correctly found that the security was imposed by judicial order and that the deputies' conduct in enforcing that security was reasonable. (A. 6, 19)

Even crediting Chathas' testimony, which is contradicted by Ellis and by Petitioners' own pretrial stipulation, deputies assured that she went to the jury room, as required by the security procedure in place that day. She not only did not testify that she was willing to go, but in fact testified that she intended to go to the courtroom, and took a step toward the courtroom. Moreover, as the court of appeals noted, she offered no evidence of any injury. (A. 17-18) If her claim is one of unreasonable seizure, it cannot be disputed that she had no right to proceed until she had completed the judicially ordered security procedures in place that day, and requiring her to so proceed was not unreasonable.

Ms. Chmielewski merely examined Chathas' purse, and patted her down, manifestly reasonable conduct under the circumstances. (A. 11) Chathas has no claim whatsoever

against Ross or Ruffalo, especially as she admitted that she repeatedly entered and left the jury room. (A. 11)

Moreover, even if Ellis' testimony that Ross pulled him away from the courtroom is credited, Ellis himself said that he was struggling (Tr. 816) and that he was not willing to proceed voluntarily. (A. 19) He too claims no injury. (A. 18) Furthermore, Ellis did not even claim any force or alleged misconduct by Ruffalo. (A. 12)

Finally, there was no evidence whatsoever of any conspiracy (A. 19), and none, in particular, to keep Petitioners from access to court for their litigation. (A. 16) Petitioners utterly failed to prove any constitutional violations, and the directed verdict was properly affirmed.

It is apparent from this discussion and from the evidence at trial that the deputies' conduct was reasonable. Moreover, the court of appeals correctly stated that the law on excessive force was unsettled in 1981. (A. 18) In fact, it was not really settled until 1989, with this Court's opinion in *Graham v. O'Connor*, ____ U.S. ____, 109 S.Ct. 1865, 1872-1873 (1989), clarifying the Fourth Amendment standard of objective reasonableness, previously adopted by the Seventh Circuit in *Lester v. City of Chicago*, 830 F.2d 706 (7th Cir. 1987). In 1981, the standard in the Seventh Circuit was no more lenient then that described in *Gumz v. Morrissette*, 772 F.2d 1395 (7th Cir. 1985), which required severe injuries, grossly disproportionate conduct, and malice or shocking of the conscience. Manifestly, as the court of appeals found in this case, there was no excessive force. (A. 16-18)

Petitioners failed to prove that the deputies' conduct was unreasonable under the circumstances. Consequently, the directed verdict was proper, either because there was no violation, or because of qualified immunity. Fur-

thermore, Petitioners fail to cite cases which are inconsistent with the court of appeals decision.

Camara v. Municipal Court, 387 U.S. 583 (1967), involved warrantless administrative searches, and like the rest of Petitioners' analysis, has no application to courthouse security, set up pursuant to judicial order, based on reasonable grounds. Examination of Petitioners' citation of only general authorities, and their argument which ignores the essential context of the events of March 30, 1981, establishes that Petitioners have failed to assert proper grounds for the writ they request, which should therefore be denied.

CONCLUSION

For the foregoing reasons, the Respondent Deputies pray that the writ of certiorari be denied.

Respectfully submitted,

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